

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIN SAFIER, on behalf of)	
himself and those similarly)	
situated)	No. C05-3353 BZ
)	
Plaintiff(s),)	ORDER AWARDING FEES AND
)	COSTS
v.)	
)	
WESTERN DIGITAL CORPORATION,)	
)	
Defendant(s).)	
_____)	

Before the court is class counsel's motion for attorneys' fees in the amount of \$485,000 and costs in the amount of \$10,190. For the reasons set forth below, I find that class counsel's efforts on behalf of the settlement do not merit the full amount of fees they claim and award them \$231,360.

On March 22, 2005, Orin Safier ("class plaintiff"), a current New Mexico resident and former California resident, and Michael Lazar, a California resident, brought an action in San Francisco Superior Court of California against defendants Seagate Technology LLC and Western Digital Corporation ("defendant" or "Western Digital"). The complaint alleged

1 that Western Digital, which sells hard drives in the
2 replacement market, overstated the memory capacity of its
3 products by approximately 7%, because defendant computes 1
4 gigabyte under the decimal definition of 1,000,000,000 bytes,
5 instead of the binary definition of 1,073,741,824 bytes, which
6 plaintiff claims should apply. After the state court
7 sustained a demurrer to the complaint based on misjoinder,
8 plaintiffs dismissed Western Digital. On July 7, 2005, Orin
9 Safier only filed a new state action against Western Digital
10 only, which defendant removed to this court. The original
11 action, Lazar v. Seagate Technology LLC, continued in San
12 Francisco Superior Court.

13 On February 1, 2006, Safier moved for preliminary
14 approval of a class settlement, which defendant supported.
15 The proposed settlement terms included certification of a
16 national class estimated to encompass about 1 million people
17 and an agreement by defendant to state its definition of a
18 gigabyte on its product packaging and to provide each class
19 member who successfully completes a claim form with the
20 opportunity to download a piece of backup and recovery
21 software. In return, the class agreed to dismiss this lawsuit
22 with prejudice and the class and others agreed to give
23 defendant a very broad general release of all claims,
24 including a waiver of the protection offered under California
25 Civil Code § 1542.

26 I held a preliminary approval hearing on February 15,
27 2006 during which I voiced a number of concerns about the
28 settlement, which are contained in the record of that hearing,

1 and announced that I was not prepared to give preliminary
2 approval to the settlement in its then form. One of my major
3 concerns was that the benefit to defendant from obtaining a
4 release of all claims from the class and from other defined
5 persons, not limited to the release of the claim which was the
6 subject of the litigation,¹ outweighed the primary benefit
7 that the class received, a \$30 piece of software, which I
8 suspected many class members with the sophistication to be
9 able to replace a hard drive would already own.

10 Following that hearing, the parties re-negotiated some of
11 the terms of settlement. On March 8, 2006 the parties
12 submitted an Amended and Restated Settlement Agreement (the
13 "settlement agreement") which addressed many of the court's
14 concerns. Significantly, it scaled back the scope of the
15 release so that only claims that would have been barred by the
16 res judicata effect of any judgment that defendant could have
17 obtained were released and it eliminated non-class members.
18 On March 17, 2006 I preliminarily approved the class
19 settlement and ordered that notice be given. I scheduled a
20 final approval hearing for June 14, 2006.² On June 15, 2006,

21
22 ¹ The original settlement released defendant from any
23 claims "which are alleged or could have been alleged in the
24 Litigation." Safier Decl. in Supp. of Prelim. Appr., Exh. A
25 Class Action Settlement Agreement § 10.1. Arguably, this could
26 have, for example, precluded claims based on defective hard
27 drives.

28 ² At the final approval hearing, I also expressed a
concern about the inclusion in the proposed final judgment
submitted by class counsel, of an injunction against
prosecution of future claims, which created a risk of contempt
even for class members who had not received actual notice. I
altered the judgment to eliminate this risk.

1 I entered final judgment approving the settlement.

2 Class counsel have moved for attorneys' fees in the
3 amount of \$485,000 and costs in the amount of \$10,190. The
4 settlement agreement provides that defendant will pay
5 plaintiff's counsel attorneys' fees up to \$485,000 and
6 expenses up to \$15,000, subject to court approval. Class
7 counsel justify their fees using the lodestar method.

8 Where, as here, the class settlement has not created a
9 common fund out of which fees are to be paid, the preferable
10 method for determining a reasonable fee to class counsel is
11 the lodestar method. Hanlon v. Chrysler Corp., 150 F.3d 1011,
12 1029 (9th Cir. 1998)(in class action cases involving
13 injunctive relief, "courts often use a lodestar calculation
14 because there is no way to gauge the net value of the
15 settlement or any percentage thereof"). The lodestar
16 calculation begins with the multiplication of the number of
17 hours reasonably expended by a reasonable hourly rate. The
18 resulting figure may be adjusted upward or downward to account
19 for several factors, including (1) the time and labor
20 required, (2) the novelty and difficulty of the issues
21 involved, (3) the skill required to perform the legal services
22 properly, (4) the preclusion of employment by class counsel
23 due to the acceptance of this case, (5) the customary fees,
24 (6) the amount involved and the results or benefit obtained
25 for the class, (7) the experience, reputation and availability
26 of class counsel, (8) the undesirability of the case and (9)
27 the nature and length of the professional relationship with
28 class plaintiff and class members. Gates v. Deukmejian, 987

1 F.2d 1392, 1402 n.12 (9th Cir. 1992); Ferland v. Conrad Credit
2 Corp., 244 F.3d 1145, 1148-49 (9th Cir. 2001). See also
3 Hanlon, 150 F.3d at 1029 (listing as factors the quality of
4 the representation, the benefit obtained for the class, the
5 complexity and novelty of the issues presented and the risk of
6 non-payment).

7 The first obstacle to applying the lodestar approach is
8 that class counsel have failed to properly document their
9 work. Attorneys should support the hours expended and the
10 rate by adequate documentation and other evidence. Hanlon,
11 150 F.3d at 1029. Class counsel's failure to do so in this
12 case precludes the court from making an independent
13 determination of such issues as whether the hours claimed were
14 reasonable and whether they were for work done on this case,
15 as opposed to work done on the companion case, Lazar v.
16 Seagate Technology LLC, or work done in state court which
17 might not be fully compensable in federal court.³ At the same
18 time, the total of 512 hours claimed by the two attorneys does
19 not seem out of line. Class counsel are to be credited for
20 working towards an early resolution of the case. Accordingly,
21 I am prepared to calculate fees based on class counsel's claim
22 that they spent 512 hours on this case.

23 The claimed hourly rates, \$450 for Mr. Gutride and \$425
24 for Mr. Safier, are likewise thinly supported. For example,
25

26 ³ In their memorandum, class counsel have also included
27 drafting and negotiating a protective order and case management
28 conference statements in their list of tasks performed for this
case, but there is no protective order and no case management
conferences occurred in this case.

1 there is little evidence, other than Mr. Safier's assertion,
2 that those rates are consistent with hourly rates charged by
3 attorneys of similar experience. Faced with such thin
4 support, a court is permitted to use its knowledge of
5 prevailing rates to help calculate the hourly rate.

6 Defenbaugh v. JBC & Associates, Inc., 2004 WL 1874978, at * 7
7 (N.D. Cal. Aug. 10, 2004); Feuerstein v. Burns, 569 F.Supp.
8 268, 275 (S.D. Cal. 1983). Based on my knowledge of rates
9 generally and of rates I have awarded in other attorneys' fees
10 requests, and my observations of the quality of their work in
11 protecting the class, I conclude that an appropriate rate for
12 Mr. Gutride is \$400 an hour and an appropriate rate for Mr.
13 Safier is \$350 an hour. In re HPL Tech., Inc. Sec. Lit., 366
14 F.Supp.2d 912, 921-22 (N.D. Cal. 2005)(adjusting the Laffey
15 hourly rates matrix on the Department of Justice's website to
16 take into account the higher cost of living in the San
17 Francisco Bay Area and concluding that a reasonable rate for
18 attorneys with similar years of experience is \$305 per hour).
19 See also Defenbaugh, 2004 WL 1874978, at * 7 (finding rates of
20 \$435 and \$400 for attorneys with 20-plus years of experience
21 to be reasonable in 2004).

22 Accepting counsel's claimed hours and applying these
23 rates produces a lodestar calculation for Mr. Gutride of
24 \$108,800 (272 hours x \$400 per hour) and for Mr. Safier of
25 \$84,000 (240 hours x \$350 per hour) for a total lodestar of
26 \$192,800.

27 I have also concluded that class counsel are not entitled
28 to the 2.16 multiplier they seek. Many of the factors used to

1 justify a substantial multiplier are not present here. The
2 issues involved were not especially novel or difficult. Class
3 counsel have made little showing that other employment was
4 precluded as a result of this case or that this was an
5 undesirable case that other counsel would have shunned. The
6 nature of their relationship with class plaintiff also does
7 not favor a multiplier. Class plaintiff is the uncle of one
8 of the attorneys, Seth Safier, and he is also a resident of
9 New Mexico. If anything, Orin Safier's role as class
10 plaintiff introduced unnecessary questions about the propriety
11 and adequacy of a New Mexico resident representing a class
12 asserting California claims.

13 An overriding factor in determining the multiplier is the
14 result that class counsel achieved and the benefit they
15 conferred on the class. As noted above, the settlement that
16 class counsel negotiated and presented at first produced a
17 class benefit which was outweighed by the benefit defendant
18 would have received from the broad form of release to which
19 class counsel had agreed. As re-negotiated following the
20 court's initial inclination not to approve the settlement, the
21 benefit is fair and adequate for the narrow release defendant
22 received. Defendant has maintained from the outset that
23 defining a gigabyte decimally is consistent with the industry
24 standard. Defendant has not agreed to expand its capacity to
25 the binary standard but only to clarify that it uses the
26 decimal standard. Given the reality of how large a hard drive
27 is, it does not appear to the court that many class members
28 would fill their hard drives to capacity such that they would

1 have been harmed by the claimed 7% disparity. This is
2 consistent with some of the comments the court received from
3 class members who objected or sought exclusion.

4 Nonetheless, many thousands of class members will be
5 downloading something that they perceive as being of some
6 benefit to them and defendant's disclosure of how it
7 calculates capacity will certainly clarify its practice.
8 Since class counsel took this matter on a contingency basis,
9 in the sense that they had no expectation of any fee if
10 plaintiffs did not prevail, I conclude that a multiplier of
11 1.2 is appropriate. This produces a total fee of \$231,360.⁴
12 Fischel v. Equitable Life Assur. Society of U.S., 307 F.3d
13 997, 1008 (9th Cir. 2002) ("A district court generally has
14 discretion to apply a multiplier to the attorney's fees
15 calculation to compensate for the risk of nonpayment.")
16 (citation omitted). Such a multiplier is also supported by
17 class counsel's declaration that they have responded to a
18 number of inquiries from class members and will continue to
19 expend time and effort in implementing and monitoring the
20 settlement. Hanlon, 150 F.3d at 1029 (affirming fee award
21 because it "includes all future services that class counsel
22 must provide").

23 Finally, a cross-check of an attorneys' fees award of
24 \$231,360 using the percentage of recovery method establishes
25 its reasonableness. The benchmark in the Ninth Circuit is

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27 ⁴ Class counsel discuss the risks they bore in
28 "contribut[ing] substantial time and advanc[ing] significant
costs . . . with no guarantee of compensation or recovery,
against a well-funded defense." Safier Decl. ¶ 26.

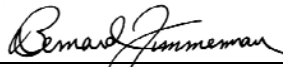
1 25%. Class counsel contend that because the class is
2 estimated to have one million class members, each of whom is
3 eligible to receive software with a retail value of \$30, the
4 recovery totals \$30 million. However, the better approach is
5 to focus on the benefits actually conferred on the class as
6 opposed to the benefits that may be hypothetically conferred
7 if all class members participated in the settlement. See
8 cautions noted in Manual for Complex Litigation (Fourth)
9 § 21.71 (2004) and in Managing Class Action Litigation: A
10 Pocket Guide for Judges § IV.C (2005). See also Staton v.
11 Boeing Co., 327 F.3d 938, 973-74 (9th Cir. 2003)(to ensure fee
12 is shifted to those actually benefitting, when value of relief
13 is difficult to quantify, "courts should consider the value of
14 the injunctive relief obtained as a 'relevant circumstance' in
15 determining what percentage of the common fund class counsel
16 should receive as attorneys' fees, rather than as part of the
17 fund itself"). Defendant submitted a declaration that as of
18 June 30, 2006, Western Digital had received a total of 32,315
19 claim forms. Flynn Decl. re Claim Forms ¶ 3. If all 32,315
20 class members were to receive a \$30 benefit, then the value of
21 the benefit would total \$969,450, and an award of attorneys'
22 fees of \$485,000 would equal approximately 50% of the value.
23 An award of \$231,360 equals roughly 24% of the value, which is
24 close to the 25% benchmark, an indication that the reduced
25 attorneys' fee award is reasonable.⁵

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27 ⁵ While the period for filing claims remains open through
28 next week, I do not expect additional claims to materially
alter this analysis, since most class members would have
submitted claims soon after they received notice to file, which

1 The court will award the requested amount of \$10,190 for
2 costs, which include typical and reasonable copying, postage,
3 filing and mediation fees. The court will also award class
4 plaintiff an incentive of \$1,000 as requested. Van Vranken v.
5 Atlantic Richfield Co., 901 F.Supp. 294, 299 (N.D. Cal.
6 1995)(granting reimbursement of expenses and an incentive
7 award to the named class representative). In his March 8,
8 2006 declaration, class plaintiff stated that he had "reviewed
9 some court filings and and [sic] other documents, and [he]
10 participated in the settlement process." Orin Safier Decl. ¶
11 5. He also "incurred the risk of an adverse judgment," which
12 could have resulted in an award of costs to defendant. Id.
13 Together with the size of the requested incentive award, the
14 declaration is sufficient to support granting \$1,000 to class
15 plaintiff.

16 For the reasons stated above, **IT IS HEREBY ORDERED** that
17 class counsel's motion for attorneys' fees and costs is
18 **GRANTED in part** and **DENIED in part**. Class counsel is awarded
19 attorneys' fees of \$231,360 and costs of \$10,190. **IT IS**
20 **FURTHER ORDERED** that the request for an incentive award of
21 \$1,000 for class plaintiff Orin Safier is **GRANTED**. Defendant
22 is **FURTHER ORDERED** to publish a copy of this Order on its
23 website with the other settlement documents.

24 Dated: July 5, 2006

25 

26 Bernard Zimmerman
27 United States Magistrate Judge

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was given within five days after June 15, 2006.